

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF ARIZONA

3 Barry Lee Jones,)
4 Petitioner,) CV 01-00592-TMB
5 vs.)
6 Charles L. Ryan, et al.,) Tucson, Arizona
7) November 2, 2017
8 Respondents.) 1:10 p.m.
9 _____

10 TRANSCRIPT OF PROCEEDINGS
11 EVIDENTIARY HEARING - DAY FOUR

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13
14 BEFORE THE HONORABLE TIMOTHY M. BURGESS
15 UNITED STATES DISTRICT JUDGE
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1 P R O C E E D I N G S

2 (Call to order of court, 1:10 p.m.)

3 MS. SMITH: We're going to call Dr. Phillip Esplin.

4 THE COURT: All right. Sir, if you could please come
5 forward and if you wouldn't mind standing in this witness box
6 right here, madam clerk will swear you in.

7 PHILLIP W. ESPLIN, Ed.D., WAS SWORN.

8 THE COURT: All right. Ms. Smith.

9 DIRECT EXAMINATION

10 BY MS. SMITH:

11 Q. Would you please state your name for the record?

12 A. Phillip W. Esplin. You spell my last name E-s-p-l-i-n.

13 Q. Good afternoon, Dr. Esplin. Thank you for being here
14 today. How are you currently employed?

15 A. I am in private practice.

16 Q. And what does your private practice consist of?

17 A. Predominantly forensic psychology with a substantial
18 portion having to do with issues relating to children as
19 witnesses.

20 Q. And do you frequently consult on criminal and civil cases?

21 A. Yes, ma'am.

22 Q. Could you briefly tell us about your educational
23 background?24 A. I've a bachelor degree obtained from Utah State University,
25 1967. I then got some education in the Marine Corps. When I

1 left active duty, I began graduate studies, Northern Arizona
2 University, got my master's in '73, continued on in their
3 doctorate program, got my degree in '78, took the national
4 licensure exam in November of '78, have been licensed since
5 that time.

6 Q. And you're a licensed psychologist here in Arizona?

7 A. Yes.

8 Q. Are you a member of any professional organizations?

9 A. Yes.

10 Q. Can you tell us about a few of them?

11 A. The American Psychological Association; within that
12 association, Division 41, which is the psychology and law
13 division; the American Psychological Society, which is
14 predominantly research oriented; the state psychological
15 association; and what's called IIIRG, which is the
16 Investigative Interview Research Group. It's a predominantly
17 European organization. But those are the ones that I currently
18 are active in.

19 Q. Thank you. Have you previously appeared as an expert in
20 court?

21 A. Yes, I have.

22 Q. And in which areas have you previously been qualified as an
23 expert?

24 A. In the area of autobiographical memory, in the area of
25 forensic psychology, and in the area of investigating cases

1 where children may have been witness or victim to a crime.

2 Q. And have you, in your career, worked with both prosecutors
3 and defense attorneys?

4 A. Yes, I have.

5 Q. And have you also worked with some law enforcement
6 agencies?

7 A. Yes.

8 Q. When did you begin working in the area of the reliability
9 of child witnesses?

10 A. I submitted a paper to a NATO conference in nineteen
11 eighty -- the conference was held in 1987 in Italy and that was
12 the first time that I had published any works in the area. So
13 it kind of began there. I began an interest in it some years
14 earlier and studied with a German psychologist named Udo
15 Undeutsch with a system that had been developed in Germany that
16 there was some interest in, so -- but I jumped in with both
17 feet around 1988.

18 Q. Okay. Dr. Esplin, did you write a report in connection
19 with this -- your work in this case?

20 A. Yes, I did.

21 Q. Can we take a look at your report, which is Exhibit 115,
22 which has been admitted in evidence? And, Dr. Esplin, this
23 first page, can you identify what we're looking at there?

24 A. That's where I'm making a sworn declaration.

25 Q. All right. And then at page 49 -- oops, sorry. I think we

1 need to go up one page or two -- let's go to page 47. And is
2 this the report that you prepared in this case?

3 A. Yes.

4 Q. Now let's jump ahead to page 49. Sorry about that. And
5 can we highlight the second paragraph up there? And in your
6 report you stated that by the mid-1990s there was a scientific
7 consensus regarding the general principles of investigative
8 interviews that would substantially reduce the risk of
9 obtaining unreliable information from child witnesses. Is that
10 accurate?

11 A. Yes.

12 Q. And I think you've recently provided us an updated CV which
13 is Exhibit 117A.

14 A. Yes.

15 Q. Is that what we're looking at here?

16 A. Correct.

17 Q. We'll make it bigger when we dive in a little bit.

18 A. Okay.

19 Q. Were you conducting trainings related to interview
20 techniques or forensic interviewing of children by the early to
21 mid-1990s?

22 A. Yes.

23 Q. Can we take a look at page 19? And just enlarge the top
24 half of that page. And are these some examples of some of the
25 trainings that you were giving in the early '90s?

1 A. Yes, it is.

2 Q. And I guess late '80s also. And some of those were in
3 Arizona?

4 A. Yes.

5 Q. I don't know that we need to go page by page but there's a
6 few pages in here of trainings that you were providing in the
7 early '90s. Does that sound accurate?

8 A. That's correct.

9 Q. Have you also published scientific articles and book
10 chapters on this topic by the early 1990s?

11 A. Yes, I have.

12 Q. And if we can take a quick look at page 7. If we could
13 highlight the last few entries on that top section. Are these
14 examples of some of the book chapters that you had written in
15 the early '90s about the reliability of child witness
16 testimony?

17 A. Yes.

18 Q. And then if we go on to the next page, are these some
19 scientific papers that you published on that topic?

20 A. Well, these would be considered papers presented at
21 scientific meetings.

22 Q. Got it. Excuse me. So these are scientific papers that
23 you presented in the early '90s on this topic?

24 A. Correct.

25 Q. And were you testifying in cases in the early 1990s both in

1 Arizona and in other places about these topics?

2 A. I'm sorry, counsel. I was reading. I apologize.

3 Q. No problem. Were you testifying in cases in the early
4 1990s about these topics?

5 A. Yes, I was.

6 Q. And if we could go back to Exhibit 115 quickly. And if we
7 could take a look at page 43. And, again, this is your report.
8 Attached to your report you included some lists of your prior
9 testimony. If you could just enlarge some of the top of that
10 page so we can see what we're looking at. Are these examples
11 of some of the testimony that you provided in the early 1990s?
12 I apologize, I think the years might be cut off on what we're
13 looking at but from some of the case numbers you can tell what
14 year we're in, I think.

15 A. Yeah, I think that is the 1992-93 time frame.

16 Q. Okay. Thank you. And the rest of your testimony is in the
17 record as attached to your report?

18 A. Yes, sir -- or ma'am.

19 Q. No worries. When were training guidelines or protocols for
20 child witness interviewing developed?

21 A. There were general guidelines that were published in the
22 mid-'80s and then across time those protocols began to be more
23 structured, more elaborate in their design. So you saw the
24 beginnings around the mid-'80s.

25 Q. And you've worked with a group at the National Institutes

1 of Child and Health Development in this area?

2 A. Yes, I have.

3 Q. And when did you begin working with that group?

4 A. Congress funded a child witness project that was run within
5 NICHD as opposed to it being external. And I began my
6 relationship on that project in 1988 and continued that until
7 2008 and then it was -- the database was shifted to Cambridge.

8 Q. Okay. In general terms, what are the -- some of the
9 principles to follow when conducting child witness interviews?

10 A. Most of the public protocols will incorporate the following
11 protocols. One of them is to establish rapport so that you
12 engage the child in casual conversation.

13 You want to have an objective but supportive stance. You
14 want to -- once rapport's been established, you want to
15 question the child in a way that will assist them in practicing
16 narrative training. For example, you may want to say:
17 Don't -- tell me what you did today. Let's start with when
18 your foot got out of bed until you got to my office. Because
19 children are not accustomed particularly to giving extended
20 responses so you want to engage the child and do practice.

21 If they've had a birthday recently or Christmas recently,
22 some other holiday, tell me everything about that. Let's start
23 when you first got up. Tell me everything that went on that
24 day. Again, a type of practice.

25 After that's completed, you go through a rules portion. If

1 I ask you a question and you know the answer, you need to tell
2 me. If I ask you a question, you don't know the answer, don't
3 guess. For example, if I ask you what my dog's name is, what
4 would you say? That's particularly important with the younger
5 kids because you want to -- to verify that they conceptually
6 understand the rule and, second, seem prepared to follow it.

7 Jurisdictions vary but in a jurisdiction that requires what
8 we call a truth serum, the child is then engaged in that. So
9 you want the child to understand that on the one hand, they
10 need to answer but, second, you don't want them to guess. So
11 if they know the answer, they need to tell you; if they don't,
12 you don't want them to feel that pressure that sometimes
13 children can experience.

14 Once that's accomplished, you would transition to the
15 issues under investigation typically with a statement, "Tell me
16 why you're here seeing me today", so that you can get some idea
17 of what the child has been told about what's going to happen
18 and whether they know why they're there. Sometimes they do,
19 sometimes they don't.

20 And if they answer, "Because of what Johnny did to me",
21 then you follow that with, "Tell me everything about that from
22 the beginning to the end." So you're inviting them to tell you
23 their memory.

24 Now, sometimes if children have participated in multiple
25 episodes, they may say something like, "Well, it happened a

1 lot." You would then want to ask them, "Did it happen one time
2 or more than one?" If they say more, "Two times or more than
3 two?" You don't want to ask them how many because they might
4 not know. But you want to know whether it was a single episode
5 or multiple episodes.

6 If it's multiple episodes, then generally there are three
7 rules used. One is the primacy rule, and that's a rule that
8 involves: Tell me about the first time that happened. Tell me
9 everything from the beginning to the end. That's important
10 because the first time something happens to us that's
11 personally meaningful or important to us either positive or
12 negative, we think about it, we reflect on it, we go over it in
13 our minds. So it's a memory cue but isn't suggestive.

14 The other rule is the recency rule. So -- and that would
15 involve tell me everything about the last time something
16 happened.

17 And the third is what I call the best memory rule. If a
18 child's experienced something on multiple times, you say: Tell
19 me about the time you remember the best. Because if you've
20 done something say, 20, 30 times, there may be a time that
21 stands out as somehow being different that will typically
22 happen.

23 Once that portion is complete, you then may need to focus
24 your questions, being careful not to be overly suggestive or
25 leading. But you may need to get some clarification. You told

1 me he took you into the bathroom. Tell me everything that
2 happened from when you went into the room. Tell me from the
3 beginning to the end. So you're asking them a focus question,
4 and then pairing it with an open-ended invitational question.

5 Once you've obtained that information, you then shift to a
6 neutral topic so that you can end the conversation hopefully in
7 a positive way.

8 Q. And, Dr. Esplin, many of these interview techniques were
9 developed in the context of child sexual abuse cases, correct?

10 A. That was what provided the impetus for the tremendous
11 amount of research that was accomplished and the reason was
12 that in about 85 percent of the cases there isn't physical
13 evidence, it may even be a bit higher. As a result, the
14 child's knowledge is a central piece of the investigation and
15 also they may possess information that would allow you to
16 independently corroborate or just disconfirm the story. So the
17 information in many cases of child sex abuse, the child's
18 information is quite central.

19 Q. But these rules apply to child interviews in general not
20 just in that context?

21 A. Well, we carried out some studies involving physically
22 abused children because we were interested in having ground
23 truth so we wanted to know not the details but we wanted to
24 know whether the child, you know, had experienced physical
25 abuse with scarring or other implications. So -- but the

1 utility of it, the momentum for it was related to children that
2 may have been sexually abused.

3 The other section would be kids that may have witnessed
4 something very significant, such as death of a parent, where
5 they're not an active participant in the event but they may be
6 a bystander, because there's a little bit of difference in
7 terms of the kinds of memories someone that is in the
8 experience may have from someone who's observing.

9 Q. And in this case, you reviewed some statements by some
10 child witnesses, Reynaldo and Laura Lopez; is that correct?

11 A. Yes, I did.

12 Q. And you reviewed both their pretrial statements as well as
13 their trial testimony?

14 A. That's correct.

15 Q. And you authored a report regarding your conclusions about
16 the information that the Lopez children provided?

17 A. Yes.

18 Q. And I think we're looking at the end of that report, but
19 could we take a look at page 59? And could we enlarge the
20 portion under "conclusion"?

21 And, Dr. Esplin, in your report, you said that given the
22 totality of the information you reviewed, it was your opinion
23 that the information obtained from the Lopez children regarding
24 the defendant is unreliable as the result of post-event
25 contamination, both with regard to interviewing the children

1 with others present and information provided to the twins via
2 the television coverage as well as the use of interview
3 procedures that did not involve scientifically sound methods.

4 Is that your opinion based upon the materials that you've
5 reviewed?

6 A. Yes.

7 MS. SMITH: Your Honor, I would like to use an
8 illustrative exhibit with this witness just so we don't have to
9 flip between transcripts. It's been provided to the
10 respondent's counsel. They -- my understanding is they don't
11 object to using it illustratively.

12 THE COURT: Any objection?

13 MR. BRACCIO: No objection.

14 THE COURT: Okay.

15 MS. SMITH: So we'll pull up what's been marked as
16 Exhibit 115A. If you could go to the next slide.

17 BY MS. SMITH:

18 Q. Dr. Esplin, did you provide some factors that are known to
19 potentially compromise the reliability of child witness
20 statements?

21 A. Yes.

22 Q. And those are listed both here and on the next slide?

23 A. I assume the next slide, too.

24 Q. Thank you. Did you observe that some of these factors were
25 present in the interviews and testimony that you reviewed from

1 the Lopez children?

2 A. Yes, I did.

3 Q. And are there a few in particular that stood out to you?

4 A. The interviews I reviewed could be characterized as having
5 excessive leading and suggestive questions as well as what's
6 called forced choice. Forced choice would be: Were your
7 clothes on or off? Were you -- was the car going fast or slow?
8 They're questions that children have a tendency to pick an
9 alternative even when the alternative may not be present and so
10 they're questions that are better off -- well, you're probably
11 better off not using them with any age of a witness but I think
12 there's some -- some variables that also increase the risk with
13 children.

14 In looking at the selective reinforcement of responses, you
15 could see that present across the interviews. You could see
16 with -- the one that I did not see was the single versus
17 multiple events because the episode was a single event. I
18 noticed that the less confidence when initially questioned
19 leads to more susceptibility to internal or external
20 influences. Internal would be where you're trying to reason it
21 out where you don't have a memory of it and external influence
22 would be where you're trying to pick up information from
23 someone else.

24 You see what I would consider evidence of altered or
25 uncertainty in some key elements of the events. You see

1 examples of meta-cognition. Meta-cognition is a type of source
2 monitoring. So knowing what the origin is of your belief,
3 children are less capable than adults or older, say, kids, or
4 adolescents at that concept. So at times they can get confused
5 about whether they remember it from the experience or whether
6 someone told them something about it and they then incorporated
7 that into their own belief.

8 Q. And I think you provided some examples of each of these
9 things you just described in your report and what we've done is
10 put these into slides. So if we can go to the next page.

11 A. Okay.

12 Q. So one of the issues you identified was direct or
13 suggestive questioning. And you identified some direct or
14 suggestive questions in the police interview of Reynaldo Lopez
15 which was on May 3rd, 1994?

16 A. Yes, and the other interesting issue here which is also
17 supported in the literature that when you ask kids forced
18 choice, some of them will always choose the first, some of them
19 will always choose the last. And if you look here, every
20 answer was the second choice. And --

21 Q. And by "forced choice", you mean kind of like a multiple
22 choice question?

23 A. Yes. Long curly? Was it nice and neat or was it all
24 messed up? So he's given three choices. First one was short
25 curly hair or long curly hair.

1 Q. Could we take a look at the next slide? And I think you
2 also saw some questions like this in the interview of Laura
3 Lopez that was conducted by the police?

4 A. Yes. And the other problem with a lot of these questions,
5 for example, was it short hair or long hair, you're asking the
6 child to classify something into a category, you're not asking
7 them to describe the appearance. So it's a different kind of a
8 task as opposed to, say: Tell me about what he looked like.

9 Q. And does that affect the reliability of the answer?

10 A. It -- these type of questions tap what's called recognition
11 memory. The invitational type questions tap free recall
12 memory. Free recall memory is significantly more accurate than
13 the other type of memory, than recognition memory, and that's
14 why you want to emphasize the types of questions that foster
15 free recall.

16 Q. Let's go to the next page. I believe one of the other
17 issues you identified in your report was that the children's
18 statements were inconsistent over time; is that true?

19 A. Yes.

20 Q. Okay. So are you aware that the children were interviewed
21 by the police on May 4th, 1994?

22 A. Correct.

23 Q. And then they also had an interview with the defense
24 attorneys and I believe it was January of 1995?

25 A. Correct.

1 Q. And then they testified at Mr. Jones' trial in May of 1995?

2 A. Correct. They also had some unrecorded interview with the
3 mother and possibly the father that was the initial report. So
4 those I considered also but there's not a record of them.

5 Q. Okay. And here we have some statements from Ray Lopez that
6 were given at his police interview in May of 1994 where he's
7 describing the appearance of the man that he saw in the van.
8 He said he had a hat on, it was kind of blue and white in the
9 front.

10 If we could look at the next page. Here Ray Lopez is again
11 asked about the appearance of the man in the van. We have some
12 questions and answers. He describes the guy as having curly
13 hair, really curly like an afro. And then can we look at the
14 next slide? And then at the trial when he was asked about the
15 man's appearance, he said, did you notice anything about what
16 the man looked like? And he said no. Do you remember anything
17 about the man's hair? And he said bushy.

18 Can you comment about Ray's testimony over time on that
19 topic?

20 A. Well, the response that he doesn't recall anything about
21 the appearance. I don't know, bushy's a little more confusing
22 to me. What did he mean by "bushy"? 'Cause it could be curly.
23 So there's a relationship there but I don't know.

24 Q. And notably he didn't mention a hat in his later statement;
25 is that true?

1 A. Correct, he never mentioned a hat.

2 Q. Let's take a look at the next page. Now we're looking at
3 some statements made by Laura Lopez.

4 A. Okay.

5 Q. In this statement Laura is asked some questions about what
6 the man was wearing and what she could see.

7 A. Correct.

8 Q. And do you see some inconsistencies here in her statements?

9 A. Yes.

10 Q. And does that have an effect upon your opinion about the
11 reliability of her memory?

12 A. The key concept that I'm exploring in this type of analysis
13 is how reliable is the information. Another term would be how
14 trustworthy is the information across time because there needs
15 to be some level of trustworthiness in order to address the
16 other issues.

17 And researchers have tried to identify with some areas of
18 agreement, some areas of disagreement what core elements of an
19 experience would consist of and that's -- research has been
20 done by exposing kids to certain events, taping those,
21 questioning them, to see what categories of details tend to
22 form that -- the core elements.

23 And so statements across time with kids that have
24 experienced an event that has substantial meaning, that they've
25 thought about, those core elements will remain quite steadfast.

1 You will see some variations, some additions and omissions,
2 particularly with peripheral details that are not as important
3 in the event.

4 So it's important when possible to look at the shape of the
5 memories across time to see whether or not you can rely on what
6 they're saying. If they differ with each time, they're not
7 reliable. So I don't know how, then, a jury would try to
8 figure out how much weight to put on the statements without
9 looking towards independent corroboration as opposed to the
10 information directly.

11 Q. Let's take a look at the next slide here. And I believe
12 this -- I'm sorry, can we go one more ahead. I believe this
13 may illustrate what you were just saying about some of the core
14 elements changing over time. Here Laura is asked about what
15 she could see of the girl in the van and this was her response
16 in her initial police interview.

17 A. Correct.

18 Q. I believe you've also focused in on this last question here
19 before in your testimony -- I'm sorry, in your report, where --
20 as another forced question where she was asked if the girl was
21 laughing or crying?

22 A. Yeah, the problem is, there's also indications from her
23 that she couldn't see it.

24 Q. Right.

25 A. And so you get an example of what I think is a child that's

1 acquiescing and then trying to pick one of the two answers,
2 which is very problematic.

3 Q. If we can take a look at the next slide. And this again is
4 a continuation of that questioning by the police of Laura Lopez
5 and do you see kind of more of what you were just describing
6 about Laura trying to come up with an answer that she thought
7 they wanted to hear?

8 A. That's how I interpreted that.

9 Q. And let's go to the next slide. Again we're hearing Laura
10 talk about the girl crying. If we go to the next slide, now
11 we're at Laura's trial testimony. Here Laura's asked if she
12 could see the face of the little girl and she says no. And
13 then she's presented with her prior statements about seeing the
14 little girl cry. And if we could go on to the next slide.
15 Based upon this questioning and the previous questioning of
16 Laura, what do you think of her memory of what she saw of the
17 little girl and its reliability at trial?

18 A. I think that it's contradictory, that statement.

19 Q. And I believe you just talked about the importance of
20 allowing the jury to be aware of some of the factors that would
21 affect the reliability. Do you think it would have been
22 important for Mr. Jones' jury to have some information about
23 why these statements might not have been reliable?

24 A. Yes. I think that this information goes well beyond the
25 common sense purview of the population of the jury. I believe

1 that there's a lot of misinformation that they may hold. I
2 think that in certain cases I think providing them an
3 educational foundation would hopefully have some positive
4 effect on their task.

5 Q. Could we go to the next slide, please? Actually, let's
6 skip a few ahead. Okay. So you mentioned earlier that there
7 was an -- your understanding was there was initial interview
8 with Mom and maybe Dad?

9 A. Yes.

10 Q. And did you -- do you recall that the mother, Norma Lopez,
11 was also interviewed by police?

12 A. Yes.

13 Q. And do you have an opinion about Mom's potential effect on
14 the kids' statements?

15 A. One issue that was very troubling was that the children had
16 made a statement so you had a sense that they saw something
17 that was concerning and they reported that upon their return.
18 Then they're questioned, don't know to what extent, by Mom,
19 they're together apparently, and then they saw the news.

20 Q. And I think if we go to the next slide, that comes out
21 here.

22 A. Well, she describes when, you know, they saw the news and
23 there were at least three of them, mother and the twins, and so
24 there you create a circumstance where you get -- may get
25 contamination between the two witnesses.

1 Q. So just to be clear, your understanding is that Mom,
2 Reynaldo, and Laura were all interviewed in each other's
3 presence by the police?

4 A. I'm certain that the mother was present during the twins'
5 interview. I do not know -- I don't think the girls were
6 present when the police interviewed the mother but I don't know
7 for sure.

8 Q. And the twins were present for each other's interview?

9 A. Correct.

10 Q. All right. I think we can skip a couple of slides ahead.
11 We also -- one back. I'm sorry. You also talked about the
12 fact that the kids watched TV. They saw something on the news
13 that might have affected their recollection.

14 A. May have affected their recollection, may have affected
15 their motivation or need to be helpful because --

16 Q. Could you explain that a little bit more?

17 A. There's a term that describes -- it's an appeal to
18 authorities. What the term means is when a witness feels some
19 pressure to help out, then sometimes they'll try too hard to
20 remember.

21 The second problem is if the person of interest is
22 negatively stereotyped, cast in a negative light, that can
23 impact the child's motivation and attempts to try and help.

24 Q. And I think if we go to the next slide, we even see some
25 inconsistency in reports about what they watched and what they

1 saw.

2 A. Correct.

3 Q. Do you have any opinion about what we could infer from
4 that?

5 A. I don't know -- I don't know whether Laura was not paying
6 attention -- I don't know, so was it inattention, or why she
7 withheld that. She later acknowledges that.

8 Q. Yeah, I think on the next slide. Here we see, I believe A2
9 is the mom participating in the conversation, A is Laura, Q is
10 the Detective Clark who is doing the interviews?

11 THE COURT: Detective Clark is which, the A or the A2?

12 MS. SMITH: The Q.

13 THE COURT: A2?

14 MS. SMITH: Is mom.

15 THE COURT: A2 is mom. A --

16 MS. SMITH: Laura. And Q is Detective Clark.

17 THE COURT: And Detective Clark, he's Q.

18 MS. SMITH: Exactly. He's supposed to be asking the
19 questions.

20 THE COURT: Yeah, no, I understand. I'm sorry.

21 BY MS. SMITH:

22 Q. And here we see some participation by Mom in Laura's
23 interview?

24 A. Yes. My concern there is you never want to have two
25 witnesses in the same room at the same time because of that

1 risk of contamination and you do not want to have your outcry
2 witness in the room. Now, it gets to be a problem with
3 parents, mom and dads, because in a lot of cases I think they
4 would have the right to be there. But it's better if it's
5 one-on-one, interviewer/child. If other people need to see it,
6 they can observe it through closed circuit or one-way mirror
7 and, as you go through these interviews, you can see the
8 problems that is created by having that, in essence, group
9 interview.

10 Q. And I think if we skip forward a few slides, we'll see some
11 evidence of the cross contamination that you identified. Keep
12 going. There we go. And in your report, you identified some
13 places where you thought that the twins' answers might have
14 been contaminated by witnessing each other's interviews?

15 A. Yes.

16 Q. And here we're talking about the man in the van again and
17 his appearance. You can just go to the next page. The first
18 slide was Ray, the second slide here is Laura. Here we see
19 Laura's asked: Did you ever see that guy before? She says:
20 No. The next question is: Did you ever see that van before?
21 And her answer is: No, but my mom's friend.

22 Do you think that her answers might have possibly been
23 influenced by the previous discussion about the mom's friend
24 that was had with Ray?

25 A. Yes, and Ray's question then was what was the scope and

1 duration of the conversations?

2 Q. If we can go to the next slide. This is just a
3 continuation of that conversation where we're talking about
4 Alonso again. If you can go to the next slide.

5 All right. So this again is an interview with Ray Lopez.
6 I believe in each case Ray went first and Laura went second.
7 This now we're looking at the defense attorney interview which
8 happened in January of 1995. And here we have some questions
9 about the hair of the man that was in the car.

10 THE COURT: I'm sorry. Before you answer that
11 question, I just want to make sure so I know, this is
12 information that you've pulled from his report; is that
13 correct?

14 MS. SMITH: Yes.

15 THE COURT: So the same information in a different
16 format is in the report?

17 MS. SMITH: I believe so. He -- I don't know that he
18 had pulled out every single line of the transcripts as we have
19 here. He identified some of the questions and answers and the
20 general issues. All of these documents are in the record and
21 he commented upon all of them.

22 THE COURT: No, I understand that, but --

23 MS. SMITH: Dr. Esplin created a chart of all the
24 children's statements which included them.

25 THE COURT: And that's in the report?

1 MS. SMITH: In the report, yes.

2 THE COURT: Okay. Thank you.

3 MS. SMITH: My only clarification is that I don't
4 think he directly quoted in every instance, he more described.
5 If that answers your question.

6 THE COURT: So he took another step -- here you took
7 another step by identifying the portions of the record he was
8 referring to?

9 MS. SMITH: Yes.

10 THE COURT: But that's not in the report?

11 MS. SMITH: Some of them are but not every single line
12 quoted here.

13 THE COURT: Okay.

14 MS. SMITH: This is -- at the bottom of every page
15 we've identified the exhibit that the -- which are all in
16 evidence, the exhibits that they directly come out of.

17 THE COURT: That's fine. Go ahead.

18 BY MS. SMITH:

19 Q. I think we can go to the next page. Now we're talking to
20 Laura and, again, we're talking about the description of the
21 man in the van?

22 A. Yes.

23 Q. And do you see any evidence of cross contamination here?

24 A. Well, she sat through the brother's interview where he
25 described the hair, so you don't know if that's coming from her

1 memory or from brother. She says she remembers. I don't think
2 source monitoring works very well with eight-year-olds.

3 And then there's an example of this multiple choice
4 question that is difficult, maybe like a black person, like way
5 curly or do you mean, she says: Yeah. Just kind of puffy,
6 kind of curly? Answer: Like a black guy's.

7 Q. So some of her answers might also be based upon the
8 questions that are posed to her?

9 A. Correct.

10 Q. Do you recall that there were some identification issues
11 also in the testimony at trial?

12 A. Yes.

13 Q. Could we take a look at the next slide? And this is an
14 excerpt from the trial testimony of Ray Lopez in April of 1995.

15 A. Yes.

16 Q. And here Ray is shown a photograph, and did Ray have
17 trouble identifying the van that he claimed to have previously
18 seen?

19 A. Yes.

20 Q. And do you recall in both the children's testimony that --
21 whether there was a description of whether the van had windows
22 or not?

23 A. Correct.

24 Q. And the children said the van did not have win -- excuse
25 me. The children had a different description of whether there

1 were windows or not than the photo of the van?

2 A. Correct.

3 Q. And let's take a look at the next slide. Ray was also
4 asked to identify the defendant in court. Do you recall that?

5 A. Yes.

6 Q. And he was unable to do that?

7 A. Correct.

8 Q. And he did, however, identify a photograph?

9 A. Yes.

10 Q. If we can go back to Dr. Esplin's report, which is
11 Exhibit 115, and if we could go to page 60. I believe in your
12 report you also provided an opinion about what you could have
13 done had you been consulted by the trial lawyers in this case;
14 is that correct?

15 A. Yes.

16 Q. And what were some of the issues that you identified as
17 potential areas that you might have been able to assist?

18 A. You summarized them right there, but optimizing
19 environment --

20 Q. You summarized them, Dr. Esplin.

21 A. I'm sorry. Optimizing environment in which the child
22 interviews were conducted, means of minimizing cross
23 contamination of information, suggestions on specific
24 questioning format for the children's mother, same for the
25 father, and the same for each child. I think there would also

1 have been a discussion about whether in these circumstances
2 they may want to use a well-trained forensic interviewer, which
3 could potentially be done, I think.

4 Q. And do you have some knowledge, based upon your review of
5 the record, whether the interviewer who did the interviews of
6 the Lopez children was a qualified investigator as you've just
7 described?

8 A. I looked at the background and training and there was not
9 any indications that there was formal training in forensic
10 fact-finding interviews.

11 Q. And as we discussed earlier, you and others were conducting
12 such trainings at that time, correct?

13 A. There was statewide trainings, I believe, in every state in
14 the country by then. And those trainings were geared towards
15 law enforcement officers who may be doing sex crime
16 investigations, social workers who may be questioning a child
17 with certain principles and formats that were part of the
18 instruction.

19 Q. Could we go on to the next page of Dr. Esplin's report? I
20 think you also provided some opinions about some consultation
21 that you could have provided just before and during the trial?

22 A. Potentially, yes, with this caveat. I will not help an
23 attorney trick a child or mislead a child. I will try to
24 assist them in questioning that will facilitate quality
25 information. Now, the rules in trial procedures sometimes

1 don't jive exactly with how we may do it in an outside
2 courtroom setting but I don't want to teach them how to
3 mislead. I don't think that's appropriate.

4 I want to -- if I give suggestions, they then have to
5 decide strategically what they may or may not do with it or
6 what approach they may or may not employ. But my focus there
7 is enhancing the quality of information from the child one way
8 or the other.

9 Q. And did your -- in your report, I think if we highlight
10 paragraph B there, I think you also suggested that you could
11 have consulted with the attorneys about whether there might
12 have been a scientific basis to move to preclude their
13 testimony; is that correct?

14 A. Yes.

15 Q. And you can close out of there. I think you also suggested
16 that it might have been appropriate to have expert testimony at
17 the trial about the reliability of the children's testimony?

18 A. Yes. Well, about factors that may be present that would
19 increase the risk of obtaining unreliable information, staying
20 behind comments that could be interpreted as getting into
21 credibility issues because that's what the province of the jury
22 is, but educational information that hopefully would help them
23 evaluate and examine the children's testimony as well as prior
24 statements that may have come in.

25 Q. And some of that would include those scientific factors

1 that we discussed --

2 A. Yes.

3 Q. -- at the beginning of your testimony?

4 MS. SMITH: Could I have just a minute, Your Honor?

5 THE COURT: Yes.

6 MS. SMITH: Your Honor, just before I close
7 Dr. Esplin's testimony, I'd like to offer into evidence this
8 PowerPoint we put together. It consists of statements from the
9 record, as we said. I don't know if the respondents still have
10 an objection or not.

11 MR. BRACCIO: Your Honor, I think at this point we
12 would object to that coming into evidence. It's a
13 demonstrative exhibit, he's testified from it, and given that
14 it was disclosed to us a few hours ago and there appear to be
15 some problems with the statements and where they come from.

16 THE COURT: Well, I will reserve admitting it in order
17 to give you an opportunity to, if you think that you want to,
18 challenge the accuracy but if the information is simply
19 information that he -- that's culled from his report, you know,
20 I would admit it. But if you -- if you think that there's
21 something in there that is inaccurate, I'll reserve ruling on
22 that to give you an opportunity to review that.

23 MR. BRACCIO: We'll waive the objection, Your Honor.
24 That's fine.

25 THE COURT: Okay. Well, all right. That's fine.

1 It's admitted.

2 MS. SMITH: We'll provide a copy to the clerk. And I
3 don't have any other questions right now.

4 THE COURT: Okay. Thank you.

5 Cross-examination?

6 CROSS-EXAMINATION

7 BY MR. BRACCIO:

8 Q. Good afternoon, Dr. Esplin.

9 A. Good afternoon.

10 Q. Good to see you again.

11 A. It's good to see you.

12 Q. You testify quite a bit in Arizona, correct?

13 A. I have over the years.

14 Q. And in the vast majority of those cases in, say, the last
15 five years, you've testified for the defense, correct?

16 A. It's been predominantly dominated by the defense. I think
17 there was one case in Pima County, I don't know if it was
18 within that five years, in which I was a rebuttal expert for
19 the State. But the majority of cases would have been all made
20 by the defense.

21 Q. And how much have you charged so far in this case?

22 A. I don't know. I gave you an estimate when we visited and I
23 think I have, I want to say, another 10 hours at least,
24 somewhere in that neighborhood of 10 to 15 additionally.

25 Q. I believe you indicated in the interview you had charged

1 about \$26,000 by that point?

2 A. That's correct.

3 Q. Okay. So probably around the area of \$30,000?

4 A. I would say that's a fair estimate.

5 Q. You were asked in this case to determine and render a
6 professional opinion regarding the interview techniques used on
7 pivotal child witnesses and whether there was a likelihood of
8 misidentification by the child witnesses due to the way that
9 they were interviewed, correct?

10 A. Yes.

11 Q. This is not a misidentification of Barry Jones, correct?

12 A. Well, my recollection is when they showed a photo, they
13 were shown a single photo so it wasn't a proper photo line-up.
14 There then was confusion in terms of not identifying him in
15 court. But that could have been a change of appearance so I
16 haven't seen the photo. Sometimes there will be some change of
17 appearance that will confuse a child.

18 Q. In your review of the documents in this case, do you recall
19 that Barry Jones admitted he was in the Choice Market parking
20 lot on May 1st, 1994, along with Rachel Gray?

21 A. Yes.

22 Q. Driving a yellow van?

23 A. Correct.

24 Q. You agree that children over the age of four can be
25 reliable witnesses, correct?

1 A. I think I wrote that, and we did a major study that
2 examined that because there was some skepticism about
3 four-year-olds and so we examined it and felt that, left to
4 their own devices, they can provide reliable information.

5 Q. Okay. Let me pull up Exhibit 207. This is your interview
6 with us at page 27 --

7 A. Okay.

8 Q. -- lines 17 through 21, and you indicated to us in the
9 interview that you believed children by four years of age can
10 be reliable informants as long as the event under investigation
11 is not too remote and as long as they're interviewed in a way
12 that uses processes that lessen the chances for acquiescence,
13 correct?

14 A. Yes.

15 MS. SMITH: Your Honor, I would just object to the use
16 of the interview as I believe that's consistent with how the
17 witness just testified. I don't know if we're trying to
18 impeach or refresh here.

19 THE COURT: Yeah, hold on a second. Give me a second.
20 Yeah, I'm not sure -- what's the basis -- I'm going to overrule
21 the objection. Go ahead with your next question.

22 BY MR. BRACCIO:

23 Q. One of the variables that you mentioned in your report is
24 remoteness, correct?

25 A. Yes.

1 Q. So the closer in time to the event the witness reports, the
2 more accurate their report is?

3 A. As a generalization and everything else being equal, yes.

4 Q. And you agree in this case that the Lopez children were
5 interviewed by detectives close in time to what they observed,
6 correct?

7 A. Yes. I wasn't as concerned with remoteness in time as I
8 was the other factors I mentioned.

9 Q. Okay. And you previously indicated that if an event is
10 very important and if there's reflection, that the memory will
11 consolidate, meaning the less important details, peripheral
12 details, things that are less important, fall out, correct?

13 A. I would agree.

14 Q. The core elements of the experience remain quite steadfast
15 if it's important?

16 A. I would agree.

17 Q. So kids could remember a traumatic event they saw but maybe
18 not remember insignificant details?

19 A. If -- if the event has sufficient complexity, if they had
20 sufficient exposure time, if they had a emotional investment at
21 some level, then they tend to think about it and that
22 strengthens the memory traces, makes them less susceptible to
23 decay or alteration.

24 Q. You would agree that if a child witnesses violence for the
25 first time, that would be an important salient event, correct?

1 A. I would agree.

2 Q. You agree that the Lopez children saw something, correct?

3 A. It appeared to me that they saw something happen, they saw
4 something in the van that -- that had some emotional
5 significance.

6 Q. So this was obviously a memorable event for them?

7 A. Yes, because in my opinion it led to the immediate report
8 to Mom so it had to be of sufficient import to disclose that.

9 Q. And seeing a man beat a young girl could be a traumatic
10 event, correct?

11 A. Yes.

12 Q. Especially to another young child?

13 A. Yes, because sometimes -- it's an interesting topic, but
14 sometimes children that witness violence are more adversely
15 affected than children that experience violence. And we think
16 it might be because they don't know how much it hurts and they
17 worry about it. So there's some interesting data on children
18 witnessing violence as compared to children who experience
19 violence.

20 Q. You believe that certain aspects of the Lopez children's
21 testimony was reliable, correct?

22 A. Yeah, that they saw a van, apparently the van was moving,
23 they saw some objects in the van, and they saw some movement in
24 the van, and they saw what appeared to be swerving of the van.
25 That seemed to be -- those factors seemed to be consistent.

1 Q. And that was in the Choice Market parking lot?

2 A. Correct.

3 Q. And that van was yellow?

4 A. Correct.

5 Q. And I believe you previously indicated that Rachel's blood
6 in that van could also have some value for corroboration of the
7 Lopez children's account?

8 A. Well, I would defer that to a blood splatter expert but I
9 think that that was noteworthy of something, somehow there was
10 some blood in the van.

11 MR. BRACCIO: Thank you. No further questions.

12 THE COURT: Thank you. Redirect?

13 REDIRECT EXAMINATION

14 BY MS. SMITH:

15 Q. I just have one brief question. Do you know whether the
16 Lopez children had previously witnessed any violence?

17 A. I do not know directly.

18 MS. SMITH: That's all I have.

19 EXAMINATION

20 BY THE COURT:

21 Q. Just a couple of quick questions. So I thought I
22 understood your introductory testimony to be that you
23 identified issues with the interview techniques that were used
24 with the children in this case; is that correct?

25 A. Yes.

1 Q. And can you tell me, were the principles that you rely on
2 to reach that conclusion principles that were established or
3 well established at the time of the investigation in this case?
4 And let me preface that by saying I understand that this is a
5 science and it's not static but are we looking at this through
6 the lens of 2017 or were some of these principles accepted at
7 the time of the interview in this case?

8 A. In my -- there's an appendix in the report in which I
9 referenced literature 1995 back that addressed these various
10 issues. So the answer would be by the early '90s there was a
11 massive effort, and these general principles were agreed upon
12 in the community, and states were developing child advocacy
13 centers across the country very rapidly.

14 What was not unsettled is the dosage level, what does it
15 take in terms of inappropriate questioning, you know, to get
16 acquiescence or influence. But not that the -- the concepts
17 were there and were in the field.

18 Q. Well, you anticipated my next question because were these
19 academic concepts or had they been transformed into practical
20 techniques in the field?

21 A. Our -- the research that I was involved in for the 20 years
22 was what's called quasi-experimental field research. All of
23 our research sciences were with police departments, child
24 advocacy centers that were involved in the live investigation
25 of kids and it was important for us to take the laboratory

1 research, the principles that had been defined in the
2 laboratory, and develop a way to apply them to the field.

3 So beginning -- and part of our enticement for various
4 locations was to provide free training to the social workers,
5 detectives, attorneys that wanted to participate, and we were
6 doing that across the country. And there was also a lot of
7 other training occurring at that -- during that time frame.

8 Q. All right. And I don't have your CV in front of me but
9 were you -- were you an expert in this field at that time and
10 testifying on this topic at that time?

11 A. By 1990, the answer was yes.

12 Q. 1990?

13 A. 1990. I think the first case I testified in was in Ocala,
14 Florida, and it happened to be a child that I'd interviewed
15 there as part of that project and so I testified in a criminal
16 trial.

17 THE COURT: Okay. I don't know, again, if -- and I
18 want to give the parties an opportunity that if something I
19 have asked has suggested a follow-up question you think is
20 important, I want to give both of you the opportunity so let me
21 start with respondents, is there anything you want to follow up
22 on?

23 MR. BRACCIO: No, Your Honor.

24 THE COURT: Petitioners?

25 MS. SMITH: Just a couple of quick things.

1 FOLLOW-UP EXAMINATION

2 BY MS. SMITH:

3 Q. You were giving trainings to law enforcement agencies in
4 the early '90s?

5 A. Correct.

6 Q. And you were testifying in cases here in Arizona in the
7 early '90s also?

8 A. Yes.

9 MS. SMITH: That's it.

10 THE COURT: Thank you. You may step down, sir.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: Okay. Were there any other witnesses for
13 today?

14 MS. SMITH: No, Your Honor.

15 THE COURT: Okay. So -- and I think you said there
16 were three witnesses for tomorrow. And my question is this:
17 Are we better off starting at 8:30 or is 9:00 o'clock -- I just
18 don't want to run out of time if you've got witnesses, some of
19 whom are from out of town. We can start at 8:00 o'clock if you
20 want.21 MS. SMITH: I think if we start at 9:00 o'clock we'll
22 be fine.

23 THE COURT: Okay. Okay.

24 MS. SMITH: We finished quickly today so --

25 MR. SANDMAN: We're in a rhythm.

1 THE COURT: All right. Sounds good. So three
2 witnesses tomorrow. Then I know we've got at least one witness
3 on Monday.

4 MR. BRACCIO: Correct. Sonia Pesquiera, and she's
5 also indicated to me that she can be here all day so it's
6 really up to Your Honor if you'd like to start in the morning
7 or in the afternoon. If we start in the morning, we'd likely
8 finish her that day.

9 THE COURT: On Monday?

10 MR. BRACCIO: Correct.

11 THE COURT: Well, then let's start in the morning.

12 MR. BRACCIO: Sounds good.

13 THE COURT: No time like the present. And then
14 Tuesday we have --

15 MR. BRACCIO: Dr. Howard.

16 THE COURT: And then is he the last witness?

17 MR. BRACCIO: He's the last witness and he'll be
18 flying in here. I'll be picking him up at the airport and
19 coming directly here and he'll testify at 1:00 o'clock.

20 THE COURT: On Tuesday?

21 MR. BRACCIO: Correct.

22 THE COURT: And are we sure we can get through
23 Dr. Howard between one and five?

24 MR. SANDMAN: I believe we can, yes.

25 THE COURT: Let me phrase it this way: We're going to

1 finish Dr. Howard on Tuesday.

2 MR. SANDMAN: Yes, absolutely.

3 THE COURT: Even if we have to run late.

4 MS. SMITH: We'd really like to do that, Your Honor.

5 THE COURT: Okay. So I think then we should be in
6 good shape. Anything else we need to discuss today?

7 MR. BRACCIO: No, Your Honor.

8 MR. SANDMAN: You know, we do have -- but not today
9 because I'm not ready to do it today but we had a bunch of
10 exhibits that we had proffered and there were some objections
11 from the respondents so maybe -- maybe Tuesday morning or
12 something before Dr. Howard comes in we could settle that.

13 THE COURT: Yeah, I mean, so have -- have you -- are
14 these any exhibits -- I mean, because, frankly, on some of them
15 there have been -- there has been objections, for instance,
16 which one side or the other has finally said: Look, I don't
17 object. So maybe what I'm going to ask you to do is sit down,
18 see if you can narrow the field some and you've got some time
19 this afternoon, just --

20 MR. SANDMAN: No, we will do that before we come back
21 to you on Monday.

22 THE COURT: Okay. That would be great. I appreciate
23 that. Anything else?

24 MR. SANDMAN: That's it.

25 THE COURT: Okay. Thank you very much. Have a

1 wonderful afternoon. Hold on one second. Yeah, that's it.
2 I'll see you in the morning.

3 MS. SMITH: Thank you.

4 THE COURT: And I'm assuming you all were not planning
5 on doing oral arguments, you're going to do written summations
6 once you've had a chance to -- because, really, I mean, it's
7 kind of a tough. I think it would be a tough thing to sort of
8 formulate a closing argument absent having had a chance to
9 review the record that's been created. So we'll just do that
10 in writing?

11 MR. SANDMAN: Yeah, we all agree with that.

12 THE COURT: Got it. Thank you. We've got consensus
13 breaking out all over the place.

14 (Whereupon, the matter was adjourned at 2:25 p.m.)

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1 C E R T I F I C A T E
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I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled matter.

5
6 /s Cindy J. Shearman
CINDY J. SHEARMAN, RDR, CRR, CRC

November 14, 2017
7 DATE
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